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IN THE

Supreme Court of the United States

October Term, 1983

KARTER R. THOMAS AND KARTER R. THOMAS, INC.,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Federal Rule of Evidence 408 applies to criminal cases such that an oral attempt to compromise is inadmissible.

2. Whether the Court of Appeals' decision affirming the action of the trial court in failing to instruct the jury as to the voluntariness of the oral admission and the effect of the oral admission conflicts with decisions of other federal courts of appeals.

3. Whether the Court of Appeals' decision affirming the action of the trial court in refusing to grant a motion for judgment of acquittal or new trial following petitioners' convictions for two counts of wire fraud has so far sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

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NO._____

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KARTER R. THOMAS AND KARTER R. THOMAS, INC.,

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v.

UNITED STATES OF AMERICA,

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Karter R. Thomas and Karter R. Thomas, Inc., Petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above titled case on February 28, 1984.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is unpublished and is printed in Appendix A hereto, infra, page A-1. No opinion was rendered by the District Court for the District of Maryland. The journal entry of judgment of the United States District Court for the District of Maryland is printed in Appendix A hereto, infra, page A-7.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 28, 1984 and this Petition for Certiorari is filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment: United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 U.S.C. §1343

Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

Title 18, U.S.C. §2(a)

Principals

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

28 U.S.C. Fed. R. Evid. 408

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

STATEMENT OF THE CASE

On May 28, 1982 Karter R. Thomas ("Thomas"or "Karter Thomas") and Karter R. Thomas, Inc. ("KRT Inc") were indicted on three counts of mail fraud (18 U.S.C. §1341); two counts of wire fraud (18 U.S.C. §1343) and aiding and abetting (18 U.S.C. §2).

Pursuant to a pretrial defense motion, the three mail fraud counts, (Counts 1-3) were dismissed as to both defendants.

On September 13, 1982 the two defendants were convicted by a jury on the two wire fraud counts. Karter Thomas received a thirty-day "work release" sentence and both defendants were ordered to pay fines and restitution. The defendants filed a motion for judgment of acquittal or new trial contending that the United States District Court for the District of Maryland erred in admitting an oral statement Thomas made to an FBI agent and that the jury verdict was not supported by sufficient evidence. The United States Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court holding that: (1) Federal Rule of Evidence 408 does not apply to criminal proceedings such that Thomas' oral attempt to compromise is admissible; (2) Thomas' Fifth Amendment right to silence was not violated during an FBI interview; (3) the district court did not err in failing to instruct the jury on the voluntariness of Thomas' confession and the use of oral statements generally; and (4) that there was sufficient circumstantial evidence to support the convictions on the two wire fraud counts.

This case centered around a Cadillac automobile given to a Marriott Corporation employee (Frederick Taylor) by Karter Thomas, his father William L. "Dick" Thomas, and Karter R. Thomas, Inc., a corporation run by Karter Thomas and his father. The Government contended that the Cadillac was given for fraudulent purposes; the defendants contended it was given for a legitimate one.

The defendants were contractors specializing in drywall, operating out of Marietta, Georgia. Frederick Taylor, Marriott's employee, worked as the project manager for new construction. The Government contended that the defendants gave the Cadillac to Taylor, in part, to assist them in getting a sub-contract from Marriott, and for Taylor's assistance on the job site at Tampa, Florida.

The defendants contended that the Cadillac was given to Taylor for his assistance in locating an insurance agent selling surety bonds with whom they would be able to establish an ongoing relationship.

The alleged fraud is spelled out in Paragraph 6 of Count I of the Indictment and states that the defendants, along with Dick Thomas and Frederick Taylor, defrauded Marriott of the faithful services of its employee, Frederick Taylor; defrauded Marriott of money and things of value; and defrauded potential competitors of the defendants.

The two counts upon which the defendants were convicted charged telephone calls on December 17, 1979 and May 20, 1981, respectively.

On December 17, 1979, Frederick Taylor, the Marriott employee, was told by his superior, John Graves, that Marriott was ready to begin construction of a hotel at Tampa, Florida with Marriott, itself, functioning as the general contractor. Taylor was told to begin selecting low bidders as subcontractors.

On the evening of December 17, 1979 at 6:47 p.m. (the same date Graves instructed Taylor to begin hiring subcontractors), an eight minute telephone call was placed from Taylor's Maryland home to a telephone in Georgia registered to Rachel Thomas, the mother of the defendant Karter Thomas and the wife of Dick Thomas. The defendant Karter Thomas did not live with his mother. Other than the telephone company's toll record, the Government had no other direct evidence with regard to the telephone call itself. This call formed the basis of Count I.

Also, on December 17, 1979, at an unknown time Dick Thomas and Karter Thomas began negotiations to buy a Cadillac which was purchased the next day. Karter Thomas signed the check and various documents dealing with the purchase. Taylor had the Cadillac in his possession by January, 1980. On December 20, 1979, Marriott hired a general contractor rather than acting as its own general contractor. Karter Thomas, Inc. was used by this contractor as the drywall subcontractor. The government asserted that Frederick Taylor now had to exert influence on the new general contractor to assist those who had bribed him.

On February 6, 1981 Marriott, upon learning of Taylor's receipt

of the Cadillac, terminated him. This was well before the telephone call alleged in the second count.

Count II involved a telephone call from Karter Thomas to Graves on May 19, 1981. Graves received the call in his Marriott office in Maryland, and quoted Karter Thomas as calling to explain the innocent purpose in giving Taylor the Cadillac. Graves told Thomas to put that explanation in writing. Graves did not know where Thomas called from, and stated that he did not rely on the telephone call at all, but relied upon the letter that followed.

Although the letter was signed by Karter Thomas on May 20, 1983 at his office in Georgia, a draft of it had been prepared and possibly revised the day before, May 19, 1981, by Dick Thomas. No other evidence was introduced to establish that Karter Thomas was in Georgia on May 19, 1981, the date of the telephone call.

About six months after Taylor received his Cadillac, he approached Fred Sccozza, a bonding agent, and asked him to write a surety bond for the defendants. Sccozza did so, and the first bond written was effective July 7, 1980.

Upon F.B.I. Agent Barry encountering the defendant Thomas at Marriott's headquarters on April 24, 1981 (prior to the second telephone call), the Agent obtained an oral statement from Thomas.

Prior to the start of the trial of this case, on September 7, 1982, the court denied the defendants' pretrial Motion to Suppress the statement thereby allowing Agent Barry to testify at trial that: (1) he met Karter R. Thomas on April 24, 1981 at Marriott Headquarters in Maryland; (2) in response to the agent's questions, Karter Thomas admitted that he knew Frederick Taylor; (3) the agent informed Thomas that he was investigating the Marriott Tampa project, that he was investigating Karter Thomas personally, and that it would be in Thomas' best interest to obtain counsel at an early date; (4) the agent told Karter Thomas that the case involved purchasing a Cadillac for Taylor. Thomas inquired "as to whether or not the thing could be handled out of Court," and then immediately followed that up by asking "if Marriott got back either the car or the money, could the matter be handled?"; (5) the agent opined that he was not the agent of Marriott, but of the F.B.I. and that there appeared to be potential violations of

Federal law; (6) the defendant is alleged to have responded that he was not the only subcontractor on the Tampa job. He was told, however, that he was the first contractor to be contacted by the F.B.I. and was given the business card of an Assistant United State's Attorney; (7) the agent then testified that Mr. Thomas asked the agent not to reveal this conversation to his father, Dick Thomas, who was just outside the door (Dick Thomas was suffering from a heart condition and died prior to the indictments being obtained in this case.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IMPROPERLY DETERMINED THAT FEDERAL RULE OF EVIDENCE 408 DOES NOT APPLY TO CRIMINAL CASES SUCH THAT ORAL ATTEMPTS TO COMPROMISE ARE ADMISSIBLE.

Federal Rule of Evidence 408 codifies the common law rule that efforts to compromise a claim are salutary and should be encouraged. As such, statements made during settlement negotiations are not admissible into evidence.

Karter Thomas' statement clearly reflects an attempt to reach a settlement. He had little reason to believe initially that the matter was criminal, in that he was never given his Miranda rights, and the agent made an inferential suggestion to him that the matter could be resolved by suggesting that his lawyer call the Government lawyer, the Assistant United States' Attorney.

Thus, it is clear from what was said, and the inferences drawable therefrom that Thomas' statements were an offer to settle under FRE 408. Indeed, by the F.B.I. agent's reacting as he did and stating that he was not an agent of Marriott, he, too, clearly interpreted Thomas's statements as an effort to settle civilly.

The Fourth Circuit however, held that Rule 408 has limited applicability to criminal proceedings and stated: "[g]iven that Thomas and the F.B.I. were clearly not involved in a civil negotiation, the Defendant's position is untenable." See p. A-3 of Appendix. In so holding, the Fourth Circuit ignored the implications of the Rule and the cases addressing its use in a criminal context.

In *Ecklund v. United States*, 159 F.2d 81, 84 (6th Cir. 1947), the Court allowed into evidence at a criminal trial a settlement

In *Ecklund v. United States*, 159 F.2d 81, 84 (6th Cir. 1947), the Court allowed into evidence at a criminal trial a settlement obtained between that defendant and a victim who had paid over the O.P.A. price for a car. In reversing, the Sixth Circuit stated:

> "This contention is sound. Evidence of a civil-liability settlement previously made by the defendant in a criminal case of this character would have no real probative value to the effect that he had wilfully violated laws and regulations governing sales' prices. The defendant, himself, explained, after evidence of his settlement of the civil case had been received over his objection, that he made the settlement with the Niteks on the advice of his attorney, because he 'did not want any unfavorable publicity with reference to that lawsuit.' There is no proof whatever that he attempted to avoid criminal liability by settling the civil claim made by the Niteks against him." 159 F.2d at 84.

Similarly, in *United States v. Meadows*, 598 F.2d 984, 988-989 (5th Cir. 1979), the defendant admitted to his supervisor that he had been receiving government checks improperly through administrative error. At trial, his lawyer established on cross-examination of the government witness that Meadows subsequently agreed to a repayment schedule.

The Court assumed FRE 408 applied, citing *Ecklund*, but did not feel that the defendant's statement that the checks were issued by mistake was an offer to compromise, but merely an admission. The court did comment, with regard to the defendant's offer to make a repayment: "[a]lthough the testimony concerning the repayment schedule might otherwise have been barred by rule 408 as a settlement offer, this testimony was solicited by the defense counsel on cross-examination." 598 F.2d at 989.

Thus, it is clear that the Fifth Circuit in Meadows recognizes that FRE 408 applies to criminal cases, and in a case such as this, where there is an offer to repay, that rule prevents that offer from coming into evidence.

Davis v. United States, 226 F.2d 331, 336 (6th Cir. 1955), involved an offer to settle civil tax liability coming into evidence

in a criminal trial. The Court stated:

> "Nor did the trial court err in excluding from the consideration of the jury . . . evidence of settlement discussions carried on between the government and appellant, as to the tax liability of his corporation. Such evidence, likewise, has no probative value on the issue of appellant's guilt." 226 F.2d at 336.

In *Post v. United States*, 407 F.2d 319, 327 (D.C. Cir. 1968),*cert. denied* 393 U.S. 1092 (1969), the defendant was convicted of mail fraud and conspiracy as a result of his fraudulent activities in creating and promoting a country club. A civil settlement had been reached between the defendant and certain plaintiffs, and a clause in that settlement reflected favorably on the defendant, stating, in effect, that the money he had received from these plaintiffs was to be considered as full and reasonable consideration for services he had rendered to the Lakewood Country Club. In upholding the exclusion of this testimony, the Appellate Court noted that settlement agreements are often prepared to prevent further litigation, and should not be viewed as anything other than that. Therefore, the defendant's proffer of the settlement evidence was properly rejected.

The determination as to whether Fed. Rule of Evidence 408 applies to criminal proceedings is an important question of federal law which should be decided by this Court. The Fourth Circuit's decision to ignore the implications of the Rule and the cases applying the Rule to criminal proceedings justifies the grant of certiorari to review the judgment below.

II. THE DECISION BELOW CONFLICTS WITH OTHER COURTS OF APPEALS AS TO FAILURE TO INSTRUCT A JURY ON THE VOLUNTARINESS OF AN ORAL ADMISSION AND ITS EFFECT.

The Fourth Circuit has previously held that the trial judge must instruct on voluntariness, even in the absence of a defense request. *See, United States v. Inman*, 352 F.2d 954 (4th Cir. 1965). Furthermore, the failure to instruct can-

not be excused as "harmless error," *See, United States v. Sauls,* 520 F.2d 568, 570 (4th Cir. 1975), *cert. denied* 423 U.S. 1021, (1975), since the Government's evidence was slim. The Court did not follow its own precedent.

The basic facts of the Government's case were not disputed; what was vigorously disputed were the inferences drawable from them. In that posture, the defendant's statement seeking to settle the case out of Court; suggesting that he was not the only subcontractor on the job; seeking to protect his father from this information; and the suggestion that an Assistant United States Attorney was interested in the case, could very well have tipped the scales in favor of the Government, and most assuredly cannot be said to be harmless beyond reasonable doubt. *See, Chapman v. California,* 386 U.S. 18 (1967).

In addition, the defendants requested a standard instruction to the effect that oral admissions should be considered with caution and weighed with great care. This Court, while declining to compel the giving of such an instruction, has recognized that under certain circumstances, a failure to give it may be error. *See, United States v. Brown,* 615 F.2d 1020 (4th Cir. 1980), *cert. denied,* 446 U.S. 967 (1980).

In contrast to *Brown*, where several Government agents corraborated each other with regard to the defendant's oral statement, here only one agent testified with regard to the defendant's oral statement although two were present. Certainly, it is the better practice to give the instruction, and as the *Brown* Court noted, it appears to be mandatory if requested in the District of Columbia and the Ninth Circuit. *See, Obery v. United States,* 217 F.2d 860, 861 (D.C Cir. 1954), *cert. denied,* 344 U.S. 923 (1954); and *Stapleton v. United States,* 260 F.2d 415 (9th Cir. 1958).

These conflicts justify the grant of certiorari to review the judgment below.

III. THE DECISION BELOW AFFIRMING THE TRIAL COURT'S REFUSAL TO GRANT A MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL HAS

SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Fourth Circuit erred in affirming the District Court of Maryland's refusal to grant a motion for judgment of aquittal or new trial. Count I charges the interstate telephone call of December 17, 1979. The only evidence dealing directly with the call indicated that the call had been made from Taylor's residence in Maryland to Dick Thomas' home (not Karter Thomas' home) in Georgia. It is impossible to conclude that the call dealt with the fraud and an acquittal was mandated. *Osborne v. United States*, 371 F.2d 913 (9th Cir. 1967), *cert. denied*, 387 U.S. 946 (1967).

More importantly, the Government failed to prove that Karter Thomas had joined the alleged fraud by the time of the telephone call at 6:47 p.m. on December 17, 1979.

Taking the Government's evidence in the best light, Karter Thomas first joined the alleged fraud on December 17, 1979, when he went with his father to purchase the Cadillac. However, we were never told the time of this activity, and more specifically, if it occurred by the time of the call at 6:47 p.m. on December 17, 1979. Thus, there is a total absence of proof establishing that the alleged fraud was in existence at the time of the call. As such, the convictions cannot stand. See *United States v. Knippenberg*, 502 F.2d 1056, 1059-60 (7th Cir. 1974), where the Court stated:

> "Although joining a conspiracy subjects the late joiner to some of the consequences of earlier activity by others in furtherance of the conspiracy, and conspiracy principles apply to a multi-member mail fraud scheme, whether or not conspiracy has been formally charged, it is our opinion that an individual 'cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy . . .' In the context of use of the mails in execution of a scheme to defraud, it has been said that 'The crime consists in the posting of the letters . . . , and if the defendant was not in the scheme when

> the letters were posted he was not a principal or an accessory to the crime then committed." *Van Riper v. United States*, 13 F.2d 961, 967 (2d Cir., 1926). Language tending to support the opposite conclusion in *Bogy v. United States*, 96 F.2d 734, 741 (6th Cir., 1938), *cert. denied*, 305 U.S. 608, 59 S.Ct. 68, 83 L.Ed. 387, does not appear to have been followed. Cf., from the same circuit, *Blue v. United States*, 138 F.2d 351, 362 (6th Cir., 1943), *cert. denied*, 322 U.S. 736, 64 S.Ct. 1046, 88 L.Ed. 1570 citing and applying *Van Riper*. 502 F.2d at 1059-1060.
>
> In our opinion, the conviction of Knippenberg on the first seven counts cannot be sustained on the theory that he ratified earlier activity by joining the conspiracy, nor is there evidence capable of supporting a finding, beyond a reasonable doubt, that he knowingly participated in the scheme before the time of mailing. There is no suggestion that additional proof would be available for a new trial.

Knippenberg relied upon the concession of the Solicitor General in an analogous situation in *Levine v. United States*, 383 U.S. 265 (1966).

The Fourth Circuit also sanctioned a depature from the accepted and usual course of judicial proceedings when it affirmed the trial court's refusal to grant a motion for judgment of acquittal on Count II, stemming from the May 20, 1981 phone call. The Court stated that it believed there was sufficient circumstantial evidence to conclude that Thomas called Graves from Georgia and that the call was designed to further the fraud by lulling Marriott into inactivity, p. A-6 in Appendix. 18 U.S.C. §1343 requires that the telephone call "be transmitted . . . in interstate or foreign commerce." Absent such proof, the Court lacks jurisdiction.

There was no evidence establishing the interstate nature of the call charged in Count II. Marriott's employee, Graves, testified, that while in his office in Maryland, he received a telephone call from Karter Thomas on or about May 19 or May 20, 1981. Graves was not sure of the exact date when he received the call, and he most assuredly did not know where Karter Thomas was calling from.

The evidence produced by the Government was totally speculative and does not constitute proof beyond a reasonable doubt. Further, it is axiomatic that the telephone call must be in furtherance of the scheme for there to be an indictable offense. *See United States v. Maze*, 414 U.S. 395 (1974), *United States v. Keenan*, 657 F.2d 41, 42 (4th Cir. 1981). Obviously, if the fraud is over, the telephone call cannot be "in furtherance" of it. *See, Maze, Keenan, supra*, and *United States v. Blecker*, 657 F.2d 629, 636 (4th Cir. 1981), *cert. denied*, 454 U.S. 1 150 (1981). The Fourth Circuit applied the "lulling" theory to affirm the trial court's ruling. However, this Court has made it very clear that the facts of this case take it out of the lulling category. *See, United States v. Maze, supra*, at 414 U.S. 403 where Justice Rehnquist stated for the Court:

> "The subsequent mailings there were designed to lull the victims into a false sense of security, *postpone their ultimate complaint to the authorities*, and therefore make the apprehension of the defendants less likely than if no mailings had taken place (Emphasis added)."

Realistically, this telephone call cannot be seen as part of the alleged fraud, nor can it be perceived as an attempt to lull Marriott. It must be remembered that Marriott made it quite clear that the giving of a Cadillac to an employee of theirs by a subcontractor would not be tolerated under any circumstances, no matter what the reason for the giving of that Cadillac. Realistically, the telephone call and the letter which followed cannot be viewed as anything more than an attempt by the defendants to be allowed to bid on other Marriott projects, and Graves testified as such.

This Court has recognized that not every call or letter will suffice to be a lulling letter under *United States v. Sampson*, 371 U.S. 75 (1962). *See,United States v. Keenan, supra.*, where this Court Stated:

> "We recognize that the use of the mails to conceal a scheme can be conduct which comes within the mail fraud statute. *United States v. Sampson*, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962). In *Sampson* the defendants made a 'deliberate, planned use' of the mails to lull their victims

> into a false sense of security. 371 U.S. 80, 83 S.Ct. 175. Thus, the purpose of the mailing was to delay detection of the fraudulent scheme. In contrast, the mailing here was made by a party not associated with the fraudulent scheme and most likely contributed to, rather than prevented, the detection of the scheme." 657 F.2d at 43.

The Fourth Circuit's decision affirming the trial court's ruling is clearly erroneous and justifies the grant a writ of of certiorari to review the decision.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully Submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-5318

UNITED STATES OF AMERICA,
Appellee

v.

KARTER R. THOMAS and
KARTER R. THOMAS, INC.
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
HERBERT F. MURRAY, District Judge

Argued: November 3, 1983
Decided: February 28, 1984

Before: WINTER, Chief Judge
PHILLIPS and ERVIN, Circuit Judges

PER CURIAM:

Karter R. Thomas (Thomas) and Karter R. Thomas, Inc. (Thomas, Inc.) appeal from the district court's denial of their motion for judgment of acquittal or new trial. The motion was filed following the appellants' conviction for two counts of wire fraud in violation of 18 U.S.C. §§2 and 1843. On appeal, the defendants contend that the district court erred in admitting an oral statement Thomas made to an FBI agent and that the jury verdict was not supported by sufficient evidence. We find no merit in these contentions and, therefore, affirm the judgment of the district court.

I.

In December of 1979 the Marriott Hotel Corporation (Marriott) began soliciting bids from subcontractors for the construction of a new Marriott Hotel in Tampa, Florida. Frederick M. Taylor was given responsibility for overseeing the bid solicitation process. On December 10, 1979, Taylor received a bid for drywall construction from the Marietta Drywall Company. The bid was signed by Karter R. Thomas. Seven days later, on December 17, 1979, Marriott gave Taylor the go-ahead to begin selecting subcontractors. That same evening a telephone call was made from Taylor's home to the home of William Thomas, Karter Thomas's father. The next day, December 18, 1979, William and Karter Thomas purchased a Cadillac in Atlanta, Georgia. Payment was made by check drawn on the Marietta Drywall company account and signed by Karter R. Thomas.

On December 20, 1979, Marriott informed Taylor that instead of having Marriott serve as its own general contractor the Austin Westshore Company would be given responsibility for selecting subcontractors. At some point between December 20, 1979 and January 10, 1980, Taylor met with officials of the Austin Westshore Company ostensibly to discuss the work he had done to date on the project. On January 22, 1980, Austin Westshore informed Thomas that Thomas, Inc.[1] had been selected as the drywall subcontractor for the Tampa project. An official of Austin Westshore testified that Taylor had actively interceded with Austin Westshore on Karter Thomas's behalf, and that without Taylor's efforts, Thomas, Inc. would not have received the contract.

By the end of January, 1980 Taylor was in possession of the Cadillac purchased on December 18, 1979 by Thomas. During the course of the next year, an internal Marriott investigation revealed that Taylor had accepted the Cadillac, and in February of 1981 Marriott fired Taylor.[2]

While the Marriott investigation was pending the FBI had begun its own investigation of Taylor and Thomas, and in April of 1981

1. Karter R. Thomas, Inc., like Marietta Drywall Company, was a drywall construction company run by Thomas.

2. After being fired, Taylor pled guilty to one count of mail fraud and was sentenced to two years in prison.

requested an interview with Thomas at the Marriott corporate headquarters in Bethesda, Maryland. The FBI special agent who conducted the interview informed Thomas of the nature of the investigation and served him with subpoenas demanding production of various corporate records. When asked if he knew Taylor, Thomas responded that he did not wish to comment on "this event", but hoped that the matter could be "settled out of court." At the conclusion of the interview Thomas was given the business card of the United States Attorney handling the case and told that his attorney should contact the prosecutor listed on the card if there were questions.

Approximately one month later, on May 19, 1981, Thomas telephoned Jack Graves, a Marriott official, at Marriott headquarters in Bethesda, Maryland. Thomas acknowledged that he had bought the Cadillac for Taylor but insisted it had nothing to do with Marriott's Tampa project. Rather, Thomas explained, the Cadillac was a gift to thank Taylor for his efforts to secure bonding for Thomas, Inc. At Graves' request, Thomas confirmed his version of the Cadillac transaction in a letter to Graves.

II.

The appellants raise three separate arguments to support their position that the district court erred in admitting the oral statement Thomas made to the FBI special agent in April of 1981. First, the defendants contend that Thomas's statement to the FBI constituted an offer to settle that should have been excluded under Fed. R. Evid. 408. We disagree. Fed. R. Evid. 408 was principally designed to facilitate negotiations in a civil controversy where there is "an actual dispute . . . between the parties as to the validity or amount of the claim." 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶408[01] (1981).[3] The rule has limited applicability to criminal proceedings.[4] Given that Thomas and the FBI were clearly not involved in a civil negotiation, the defendant's position is untenable.[5]

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3. Fed. R. Evid. 408 states that:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidi-

Second, Thomas argues that "his fifth amendment right to silence" was violated by the "inherently coercive setting" in which the interview took place and by the FBI's continued questioning in the face of his expressed desire to remain silent. Addressing the latter argument first, our reading of the record indicates that Thomas stated only that "he did not wish to comment on *this event*" (referring to the Cadillac transaction). The testimony is uncontradicted that after Thomas objected, all questioning about the Cadillac ceased. Any information Thomas supplied the FBI during the interview was purely voluntary.

Nor do we believe that the Marriott headquarters in Maryland constituted an inherently coercive setting. Thomas was not under arrest, and he consented voluntarily to the discussions with the FBI at Marriott. The Supreme Court has refused to find a viola-

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ty of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

4. The rule does refer briefly to criminal proceedings, but that reference is designed only to ensure that efforts "to 'buy off' the prosecution or a prosecuting witness . . . [are not included in] the policy of the rule . . . ." Fed. R. Evid. 408, Advisory Committee Notes.

We do not mean to imply, however, "where a transaction gives rise to both civil and criminal remedies . . . a good faith offer . . . made to compromise the civil claim should [not] be protected in both proceedings." 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶408[01] (1981). Yet this situation must be distinguished from one where a party seeks improperly to use Fed. R. Evid. 408 to exclude evidence of offers made to settle criminal charges.

5. As a general matter, an offer "by the accused to the state's attorney to plead guilty in return for leniency" is not admissible. McCormick's Handbook of the Law of Evidence 265-66 (E. Cleary 2d ed. 1972); *see* Fed. R. Evid. 410. Thomas, however, was not engaged in plea-bargaining during the interview. Indeed the FBI agent testified that Thomas was advised that the investigator was not an attorney, and that if he wished to discuss matters further he should contact the United States Attorney who was handling the case.

tion of fifth amendment rights in settings far more "coercive" than this one. See, *Oregon v. Mathiason*, 429 U.S. 492 (1977) (mere fact that questioning occurs at police station does not mean *Miranda* warnings are required).

Third and finally, Thomas contends that the district court erred when it (1) failed to instruct the jury on the voluntariness of his "confession" and (2) when it failed to instruct on the use of oral statements generally. As an initial matter, we are not convinced that Thomas's statement constituted an acknowledgment of guilt such that an instruction on voluntariness was required. More important, though, the defendants argued to the jury at trial that the statements were voluntary. We have held in the past that an appellant who elects to pursue one course at trial cannot be permitted to insist on appeal that the course not taken at trial be "reopened to him." *Johnson v. United States*, 318 U.S. 189, 201 (1943) quoted in *United States v. Gomez*, 457 F.2d 593, 595 (4th Cir. 1972).

Thomas's second objection is equally unfounded. General instructions are a matter of discretion for the lower court. *United States v. Brown*, 615 F.2d 1040 (4th Cir. 1980) *cert. denied*, 446 U.S. 967 (1980). We are hardpressed to find an abuse of discretion in a case such as this one where the district court gave a general instruction that covered the essence of the instruction requested by the defendants.

III.

The defendants further contend that the evidence was not sufficient to support their convictions on either count one or two. Specifically, Thomas challenges his conviction for the first count of wire fraud on the grounds that (1) the government failed to establish that the December 17, 1979 telephone call from Taylor to William Thomas was made in furtherance of the scheme to defraud and (2) that the government failed to prove that Karter Thomas had joined the scheme before the December 17 call was made. The defendants' objection to their conviction on count two is somewhat similar. Thomas argues that the government failed to prove (1) that Thomas's telephone call to Graves was interstate, (2) that the telephone call was made in furtherance of the fraud, and (3) that Graves relied on the call.

In reviewing the sufficiency of evidence to support a conviction "the relevant question is not whether the appellate court is convinced of guilt beyond a reasonable doubt," but whether "viewing the evidence in the light most favorable to the government, any rational trier of facts could have found the defendant guilty beyond a reasonable doubt." *United States v. Tresvant*, 677 F.2d 1018, 1021-22 (4th Cir. 1982). Thomas submitted his bid to Taylor well before December 17. In his May 19, 1981 letter to Graves, Thomas admitted that he communicated with Taylor several times before the 17th. William and Karter Thomas shopped together for the Cadillac during the day on the 17th. Within hours after Taylor learned that he would be selecting subcontractors, a telephone call was placed on the evening of the 17th from Taylor's home to William Thomas's home. The following day the car was purchased on a Marietta Drywall Company check. Taken together, these facts could reasonably lead a rational trier of fact to concluded that Thomas and Taylor conspired to defraud Marriott prior to December 17th, and that the fraud scheme was discussed by interstate phone on the 17th.

Similarly, we believe there was sufficient circumstantial evidence to concluded that Thomas called Graves from Georgia and that the call was designed to further the fraud by lulling Marriott into inactivity. Thomas drafted and signed a letter to Graves—as a follow up to the call—on May 19, 1981 in his Georgia office. Thomas's secretary testified that there were no documents or records suggesting that Thomas was out of his office on May 19, 1981. Further, it is apparent Thomas had plenty of motive to perpetuate the fraud in May of 1981. Although Taylor had already pled guilty, no charges had been filed against Thomas. If Thomas could convince Marriott of his "bonding" alibi, there was still a possibility that further investigation and future prosecution could be avoided. It is difficult to believe that Thomas's call had any purpose other than that of deceiving Marriott about the true relationship between himself and Taylor.

Finally, we find no merit in the defendant's claim that Graves did not rely on the phone call. The success of a wire fraud scheme has no bearing on the innocence or guilt of the defendant. See, *United States v. Barber*, 668 F.2d 778 (4th Cir. 1982).

IV.

For the foregoing reasons the judgment of the district court is

AFFIRMED.

DATE	PROCEEDINGS
Nov. 12, 1982 (29)	JUDGMENT AS TO DEFENDANT KARTER R. THOMAS: IT IS ADJUDGED that as to Count No. 4 (*renumbered as Count No. 1) the Defendant pay a fine in the amount of One Thousand Dollars ($1,000.00). IT IS FURTHER ADJUDGED that the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years. Execution of sentence as to imprisonment only is suspended and the defendant is placed on probation for a period of two (2) years under the usual terms and conditions of probation and the further special conditions: (1) that Defendant reside for the first thirty (30) days in the work release program of the community treatment center in Atlanta, Georgia; and (2) that the fine be paid as directed by the probation officer. IT IS FURTHER ADJUDGED that the Defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years. Execution of sentence as to imprisonment only is s pended and the Defendant is placed on probation for a period of two (2) years under the usual terms and conditions of probation and the further special conditions: (1) that the fine be paid as directed by the Probation Officer; and (2) that the Defendant make restitution to the Marriott Corporation as directed by the Probation Officer. Said period of probation imposed as to Count Nos. 4 and 5 (renumbered as Count Nos. 1 and 2) to run concurrently,

making a total period of probation of two (2) years. Said fines imposed as to each of Count Nos. 4 and 5 (renumbered as Count Nos. 1 and 2) are to be cumulative, making a total fine of Two Thousand Dollars ($2,000.00). Upon motion of defendant, Count Nos. 1, 2 and 3 were dismissed by the Court prior to trial. Order (Murray, J.) dated 11/1/82.

DATE	PROCEEDINGS
Nov. 12, 1982 (29)	JUDGMENT AS TO DEFENDANT KARTER R. THOMAS, INC.: IT IS ADJUDGED that as to Count No. 4 (renumbered as Count No. 1) the Defendant pay a fine in the amount of One Thousand Dollars ($1,000.00). IT IS FURTHER ADJUDGED that imposition of sentence is suspended and the Corporate Defendant is placed on probation for a period of two (2) years on the special conditions: (1) that Five Hundred Dollars ($500.00) of the fine be paid as directed by the Probation Officer; and (2) that the Defendant make restitution to the Marriott Corp., as directed by the Probation Officer. IT IS FURTHER ADJUDGED that as to Count No. 5 (renumbered as Count No. 2) the Defendant pay a fine in the amount of One Thousand Dollars ($1,000.00) to be paid within thirty (30) days. Said fines imposed as to each of Count Nos. 4 and 5 (renumbered as Count Nos. 1 and 2) to be cumulative, making a total fine of Two Thousand Dollars ($2,000.00). Upon motion of defendant, Count Nos. 1, 2 and 3 were dismissed by the Court prior to trial. Order (Murray, J.) dated 11/1/82.

UNITED STATES OF AMERICA,

v.

KARTER R. THOMAS and
KARTER R. THOMAS, INC.

CRIMINAL NO.
(Mail Fraud, 18 U.S.C. Section 1341,
Wire Fraud, 18 U.S.C. Section 1343,
Aiding and Abetting, 18 U.S.C. Section 2)

The Grand Jury for the District of Maryland charges that:

1. At all times pertinent to this indictment, the Marriott Corporation (hereinafter referred to as Marriott), a corporation with its principal office in Bethesda, Maryland, was engaged in the planning and construction of a Marriott owned hotel in Tampa, Florida.

2. At all times pertinent hereto Austin Westshore Company (hereinafter referred to as Austin Westshore), a corporation with its principal place of business in Tampa, Florida, negotiated with Marriott to, and thereafter did serve as the general contractor supervising the construction of the Marriott Hotel in Tampa, Florida.

3. At all times pertinent hereto Frederick M. Taylor was employed by Marriott as its project manager for the Tampa, Florida, Marriott Hotel. The duties and responsibilities of Frederick M. Taylor were to represent the interests of Marriott in the planning and construction of the Tampa, Florida, Marriott Hotel.

4. At all times pertinent hereto KARTER R. THOMAS, INC. was a corporation whose principal place of business was Austell, Georgia and whose business included the installation of drywall in buildings.

5. At all times pertinent hereto KARTER R. THOMAS was the President of KARTER R. THOMAS, INC.

6. From on or about November 1, 1979, and continuing thereafter until on or about February 11, 1981, the exact dates to the grand jury being unknown, in the State and District of Maryland, and elsewhere,

KARTER R. THOMAS
AND
KARTER R. THOMAS, INC.

and Frederick M. Taylor willfully and knowingly devised and intended to devise a scheme and artifice:

(a) To defraud Marriott of the honest, faithful and loyal performance of the duties and services of Frederick M. Taylor as its employee, free from bribery, deceit, misrepresentation and willful omission;

(b) To defraud Marriott of money and things of value to which it was entitled;

(c) To defraud competitors and potential competitors of KARTER R. THOMAS, INC. of the opportunity to compete for the business of performing as subcontractors in the construction of the Tampa, Florida, Marriott Hotel on the basis of merit, quality, and cost of construction services offered by such competitors and potential competitors.

7. It was part of the scheme and artifice to defraud that the defendants, KARTER R. THOMAS and KARTER R. THOMAS, INC. would, and did, cause Frederick M. Taylor to use his influence as the Marriott representative to cause Austin Westshore to award a sub-contract to KARTER R. THOMAS, INC.

8. It was further part of the scheme and artifice to defraud that KARTER R. THOMAS and KARTER R. THOMAS, INC. would and did provide Frederick M. Taylor with a 1980 Cadillac Seville costing in excess of $20,000.00 for KARTER R. THOMAS, INC. receiving the subcontract for drywall and to secure the cooperation of Frederick M. Taylor while performing the subcontract.

9. It was a further part of the scheme and artifice to defraud that KARTER R. THOMAS and KARTER R. THOMAS, INC. would and did conceal from and misrepresent to Marriott the truth concerning the purchase of the Cadillac for Frederick M. Taylor.

10. It was a further part of the scheme and artifice to defraud that Frederick M. Taylor would and did conceal from and misrepresent to Marriott, the truth about whether he had accepted things of value from sub-contractors.

11. On or about the 10th day of December, 1979, in the State and District of Maryland, and elsewhere,

KARTER R. THOMAS
AND
KARTER R. THOMAS, INC.

for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Frederick M. Taylor, Project Manager, Marriott Corporation, International Headquarters, Washington, D.C. 20058, from Marietta Drywall Co., Austell, Georgia containing a bid.

All in violation of Title 18, United States Code, Sections 1341 and 2.

18 U.S.C. Section 1341
18 U.S.C. Section 2

COUNT TWO

And the Grand Jury for the District of Maryland further charges that:

1. The allegations contained in paragraphs 1 through 10 inclusive of Count One of this indictment are incorporated herein by reference as though each allegation were set forth fully at length.

2. On or about the 7th day of May, 1980, in the State and District of Maryland, and elsewhere,

KARTER R. THOMAS
AND
KARTER R. THOMAS, INC.

for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Marriott Corporation, 1 Marriott Drive, Washington, D.C. 20058, from Frederick M. Taylor, Tampa, Florida, containing a requisition regarding payment of various subcontractors including KARTER R. THOMAS, INC.

All in violation of Title 18, United States Code, Sections 1341 and 2.

18 U.S.C. Section 1341
18 U.S.C. Section 2

COUNT THREE

And the Grand Jury for the District of Maryland further charges that:

1. The allegations contained in paragraphs 1 through 10 inclusive of Count One of this indictment are incorporated herein by reference as though each allegation were set forth fully at length.

2. On or about the 20th day of May, 1981, in the State and District of Maryland, and elsewhere,

KARTER R. THOMAS
AND
KARTER R. THOMAS, INC.

for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Marriott Corporation, Marriott Drive, Washington, D.C. 20058, Attention: Mr. Jack Graves, from KARTER R. THOMAS, Austell, Georgia, containing a letter which misrepresented the facts concerning the purchase of the 1980 Cadillac Seville.

All in violation of Title 18, United States Code, Sections 1341 and 2.

18 U.S.C. Section 1341
18 U.S.C. Section 2

COUNT FOUR

And the Grand Jury for the District of Maryland further charges that:

1. The allegations contained in paragraphs 1 through 10 inclusive of Count One of this indictment are incorporated herein by reference as though each allegation were set forth fully at length.

2. On or about the 17th day of December, 1979, in the State and District of Maryland, and elsewhere,

KARTER R. THOMAS
AND
KARTER R. THOMAS, INC.

for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did knowingly cause to be transmitted by means of wire and radio communication in interstate commerce signs, signals and sounds by causing an interstate telephone call to be made from the residence of Frederick M. Taylor, Germantown, Maryland, phone number (301) 926-3592, to a phone subscribed to by Rachel Thomas, Marietta, Georgia, (404) 428-0040.

All in violation of Title 18, United States Code, Sections 1343 and 2.

18 U.S.C. Section 1343
18 U.S.C. Section 2

COUNT FIVE

And the Grand Jury for the District of Maryland further charges that:

1. The allegations contained in paragraphs 1 through 10 inclusive of Count One of this indictment are incorporated herein by reference as though each allegation were set forth fully at length.

2. On or about the 20th day of May, 1981, in the State and District of Maryland, and elsewhere,

KARTER R. THOMAS
AND
KARTER R. THOMAS, INC.

for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did knowingly cause to be transmitted by means of wire and radio communications in interstate commerce signs, signals and sounds by causing an interstate telephone call to be made from Austell, Georgia to the Marriott Corporation, Bethesda, Maryland.

All in violation of Title 18, United States Code, Sections 1343 and 2.

18 U.S.C. Section 1343
18 U.S.C. Section 2

s/ _____
J. Frederick Motz
United States Attorney

A TRUE BILL:

s/ _____
FOREMAN

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the United States of America in the foregoing matter with three copies of this Petition for a Writ of Certiorari by depositing same in the United States First Class Mail in a properly addressed envelope with adequate postage affixed thereon addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Michael Schatsoz, Esq.
Juliet Eurich, Esq.
Assistant United States Attorneys
100 W. Lombard Street
Baltimore, Maryland 21202

This the 27th day of April, 1984.

s/ _____
DAVID H. FLINT
Attorney for Karter R. Thomas and
Karter R. Thomas, Inc.

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